

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 EDC 2328

<i>Student, by Parent</i>)	
<i>Parent,</i>)	
Petitioner,)	
)	
v.)	FINAL DECISION
)	
T.D., DIRECTOR)	
ABC Charter School)	
ABC Charter School)	

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge, Joe L. Webster on September 23, 24, 25 and October 1, 2009 in Durham, North Carolina.

APPEARANCES

For the *Student:*
Parent

For the ABC Charter School:
Phil S. Adkins
Adkins Law Group
PO Box 52393
Durham, NC 27717

EXHIBITS

WITNESSES

PETITIONER

Ken Benedict, Ph.D.; J.A.; W.F.; L.V.; C.B., Ed.D; and C. R.

RESPONDENT

T. D., W.C., B.A., D.G., W.S., *Student* and C.S.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at this hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making these findings of fact, the Undersigned has weighed all the evidence and has assessed the *Parent* credibility of the witnesses by taking into account the appropriate facts for judging *Parent* credibility, including , but not limited to, the demeanor of the witnesses, any interest, bias or prejudice the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case including but not limited to the verbal statements at the IEP meetings, the IEP documents, the DEC 5/Prior Written Notices, and any and all other competent and admissible evidence.

FINDINGS OF FACT

1. (*Parent*) is the mother of (*Student*) and at all times relevant to this action have resided in Durham or Orange Counties, North Carolina. *Student's* date of birth is ***, 1994. There is no dispute about whether *Student* qualifies for special education services due to her Specific Learning Disabilities in Reading (315.0), Writing (315.2) and Mathematics (315.1) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*
2. *Respondent*, Corporation for Effective Schooling (ABC Charter School) is a local educational agency receiving monies pursuant to IDEA and is the local educational authority responsible for developing IEPs for *Student* Pursuant to NCGS Section 115c-238.2A *et Seq.* the State of North Carolina chartered the ABC Charter School to operate a 6-12 grade school in Durham, North Carolina. ABC Charter School is a public independent charter school that is not a part of the Durham Public School system but is accountable to the State Board of Public Education and Department of Public Instruction for purposes of ensuring compliance with applicable laws and the provision of its charter. ABC Charter School is a Local Educational ("LEA") for the purposes of the Individuals with Disabilities Act of 2004 ("IDEA"), 20 USC 1400 *et seq.* and as such is required to provide special educational services to disabled children attending ABC Charter School.
3. Through her mother, *Student* filed a petition for a contested case hearing in the Office of Administrative Hearings on March 31, 2009. The petition contains, among other allegations, that *Student* had been denied a free, appropriate education for the 2007-2008 school year.
4. Prior to attending ABC Charter School, *Student* had attended public schools in Wake and Durham counties. She had completed the fifth grade at E. Elementary School, a part of the Durham Public School System ("DPS") where the school had completed an Individualized Education Plan ("IEP").
5. In the summer of 2006, *Student* and her sibling attended the *** grade at X Middle School, a part of Durham Public Schools. *Parent* became dissatisfied with the special education department at X Middle School because, among other things, they had *Student* in a self-contained class.

6. *Parent* researched charter schools, including ABC Charter School and visited the school in October, 2006 with her children. She transferred both children to ABC Charter School on ***, 2006. *Parent* discussed *Student's* learning disabilities and special education needs with ABC Charter School and shared a copy of *Student's* IEP with ABC Charter School staff. *Parent* was assured by T.D., ABC Charter School Director, that ABC Charter School staff would be able to provide the individualized education required to meet *Student's* educational needs. (Tr. Vol. 1, pp. 163-164)
7. ABC Charter School provided special education services to *Student* during the 2006-2007 school year, and she made progress enough to be promoted to the seventh grade at ABC Charter School.
8. During the early summer of 2007, PARENT asked ABC Charter School's Director, T.D. to schedule an IEP meeting before school started to review *Student's* placement and familiarize STUDENT'S new classroom teachers with her learning disabilities.
9. Independent of *Parent's* request, C.S., *Student's* special education teacher, met informally with ABC Charter School's sixth and seventh grade teachers to discuss STUDENT and other special needs students to determine appropriate student placements for the 2007-2008 school year. (Tr. Vol. 3, p. 737, line 18 - p. 738, line 5).
10. On August 21, 2007, ABC Charter School held an IEP meeting for *Student* several days prior to the beginning of the school year.
11. *Parent* was very involved in the meeting, wanted to review the previous year's IEP goals and engaged in lively discussions about *Student's* problems and the teacher's plans regarding *Student* (Resp. Ex. 11, IEP Team meeting minutes dated 8/21/07).
12. *Parent* "suggested that speech issues may need to be addressed." The other team members indicated Ms. T. would be a resource for speech/language testing. (Id.) IEP Team Meeting minutes noted that "Ms. T. would be a source for speech-language testing."
13. After the first four or five weeks of school, *Parent* complained to ABC Charter School's Director, Mr. T.D. that ABC Charter School was not addressing the IEP goals discussed at the August 21, 2007 meeting and that they had not provided special education to *STUDENT*. PARENT shared these concerns verbally and via email with D.S., EC Coordinator, and C.S., EC Teacher. D.S. testified that *Parent* requested EC schedules at least two or three times, and further testified that both he and *Parent* requested them from Ms. C.S. but that they were not produced. Tr. Vol. 3, p. 631.
14. W.S. recommended "as part of the grievance procedure" that *Student's* parent discuss these concerns with "if not Mr. T. D., then after that the chairman of the Board" who was, at the time, Mr. P.A. W.S. was not aware, at the time, that Mr. Adkins was the brother-in-law of Mr. T.D. (Tr. Volume 3, p. 630)

15. *Parent* met with Mr. T.D. and C.R. M., ABC Charter School Middle School Director, on October 12, 2007 to discuss these concerns.

16. On November 5, 2007, *Parent* received two different Student Assessment Reports (SARs) for first quarter of the seventh grade; the first, which was provided to *Student* at school, indicated the *Student* had received Bs and Cs (with scores ranging from 85m to 88m) in four of her core classes (Math, English, Social Studies and Health), and the second, which was mailed home, indicating that *Student* had received failing or near failing grades (scores ranging from 66 to 70) in the same four classes. (See Pet. Ex. 4, pp. 3-5)

17. PARENT received an email and a letter from Ms. C.S. later that day indicating that “*Student’s* report card was mailed out before (she) could intercept it, review it, and make corrections.” (Pet. Ex. 4, pp.1-2)

18. PARENT requested via email on several occasions thereafter clarification and, specifically, an explanation of the “assessment mechanism that would allow such a huge range in grades.” (Pet. Ex. 4, pp.6-7)

19. On December 11, 2007, still not having received to her satisfaction a written EC schedule or *objective data* to support the wide variation between the two first-quarter report cards, *Parent* wrote to Mr. Adkins, the School’s Board Chair, regarding her concerns. (*Student’s* Exhibit 5, pp. 2-5)

20. On December 21, 2007, Mr. Adkins, W.S. and *Mr. R.M.* met with *Student’s* parent to hear her concerns. Mr. Adkins provided the Court with Stipulations of Testimony, entered on the 28th day of August, 2009, regarding his involvement with ABC Charter School prior to his resignation from the Board in March 2008, and specifically this meeting with *Parent*. Mr. Adkins stipulated that he “thought that it was reasonable to get *Parent* an EC schedule and notify her of changes to that schedule and directed Mr. M. to provide a written schedule as soon as possible. (He) also felt it was reasonable to better explain the way *Student’s* grade had been determined for first quarter math and to notify *Parent* if there were changes to her children’s EC schedules.” At that meeting, *Parent* also requested further explanation and clarification of progress on yearlong IEP goals.

21. On January 4, 2008, Ms. C.S. provided in a letter to Mr. M., which was subsequently provided to *Parent.*, the written EC Service Delivery Schedule, an IEP Progress Report for the period from October 2007 to December 2007, and a general explanation about how grades for EC students below grade level are assigned. (Pet. Ex. 5, pp. 9-11)

22. On February 13, 2008, *Parent* learned from *Student* that Ms. C.S. had changed the EC Schedule again without notification, contrary to the agreement which was made at the December 21, 2007 IEP Team Meeting with Mr. Adkins, W.S., and Mr. M. (See Pet. Ex. 5, pp. 12-13)

23. Ms. C.S. testified that she did not have written data to substantiate the alternative (“informal” and “oral”) assessments and that she “modified (*Student’s* first quarter) grades in a global, gestalt way.” (Tr. Vol 3, pp. 748, 781-782)

24. *Student* was working independently from a second grade workbook in her inclusion Math class and pull-out EC resource room class during February and March 2008. Specific assignments consisted of adding and subtracting one and two digit numerals. (Pet. Exhibit 10) Mr. Griffin testified that *Student* was also assigned math work during the seventh grade school year at the first, third and fourth grade levels. (Tr. Vol. 2, pp. 511, 516 and Pet. Ex. 9)

25. On February 29, 2008 *Parent* requested via telephone conversation, and again on March 4, 2008 and March 10, 2008 via email, that an Assistive Technology reevaluation be scheduled. (Pet. Ex. 12) Assistive Technology testing was also discussed at the Annual Review IEP Team Meeting on April 14, 2008. *Student* had not received an Assistive Technology evaluation since May 13, 2004. W.S. testified that these requests for reevaluation were not followed up on, nor was a DEC 2 offered, because he believed “this was more a conversation than a request.” (Tr. Vol.3, pp. 659-662)

26. On March 26, 2008, *Parent* filed a formal complaint with the Department of Public Instruction (DPI), Exceptional Children (EC) Division alleging failure to provide FAPE due to failure to conform to the IEP. (Resp. Ex. 1)

27. On March 28, 2008, *Parent* requested that *Student* be put on an abbreviated school day because she felt that the *Student*’s educational needs could best be met through one-on-one instruction with her private tutor in the areas of Language Arts and Humanities. Parent’s request was supported by the IEP Team and Prior Notice (DEC 5, 2 of 2) was signed by Parent, W.S., Mr. T.D., Ms. C.S., D.G. and B.A., regular classroom teacher for Language Arts and Humanities. (Pet. Exh. 13)

28. On April 14, 2008, the IEP Team met for the Annual Review of *Student*’s IEP. As written in the minutes of that meeting “accommodations were discussed at length.” Ms. C.S. was in attendance at that meeting. (See Tr. Vol. 3, pp. 670-671 and Pet. Exh. 17)

29. During that period and throughout the entire year, D.G., *Student*’s math teacher, allowed *Student* to use a calculator and provided her one if needed. (Tr. Vol. 2, p. 496, line 24 - p. 497, line 5). She modified the work required of *Student* (Tr. Vol. 2, p. 496 - lines 8-14). She modified the classroom tests (Tr. Vol. 2, p. 497, lines 6-16). She taught *Student* the seventh grade curriculum, but modified it specifically to focus on skills *Student* lacked, having her work through workbooks and Study Island, a computer study course, from other lower grade levels independently to reinforce basic math skills (Tr. Vol. 2, p. 498, line 22 through p. 501, line 25).

30. B.A., *Student*’s seventh grade humanities teacher testified that he modified *Student*’s class work and tests (Tr. Vol. 2, p. 484, lines 10-25).

31. C. S. testified that she had provided both in class and pull out special education services for *Student* in the first five weeks of school, but had not documented those services. (Tr. Vol.3, p. 741, line 8 through p.742, line 20). The classroom teachers corroborated Ms. C.S. (Tr. Vol. 2, p.485, lines 17-24; p. 496, lines 7-23; Vol. 1, p. 100, lines 1-11).

32. Mr. J. A., *Student's* seventh grade music and computer teacher testified that he modified *Student's* curriculum and tests. (Tr. Vol. 1, p.87, line 12- p. 88, line 1). *Parent* admitted that Mr. J. A. had made proper accommodations and modifications to *Student's* curriculum. (Tr. Vol. 1, p. 204, lines 21-23).

33. Mr. W. F., *Student's* seventh grade humanities teacher testified about modifications for *Student* including an "adaptive workbook." (Tr. Vol. 1, p. 96, lines 9-19- p. 99, lines 9-25). *Parent* admitted that Mr. W. F. had made proper accommodations and modifications to *Student's* curriculum. (Tr. Vol. 1, p. 204, lines 21-23).

34. On Friday, November 2, 2007, ABC Charter School sent out *Student's* first quarter report card without special education modification of her grades. Ms. C.S. immediately realized the mistake and e-mailed *Parent* the next Monday, November 5, 2007, indicating she had caught the mistake and was mailing her a corrected report card. (Pet. Ex. 4).

35. *Parent* demanded an explanation of why *Student's* grades had been changed. Ms. C.S. provided an explanation by return e-mail. *Parent* did not accept Ms. C.S.'s explanation and demanded further explanation. She rejected Ms. C.S.'s further explanation eventually complaining to Mr. T.D. in a December 12, 2007 e-mail. *Parent* continued to demand explanations into the third quarter of the school year.

36. *Parent* told *Student* and her sibling that the ABC Charter School's staff and, particularly, Ms. C.S., was incompetent, which adversely affected *Student's* attitude towards her teachers. *Student* often refused to go to Ms. C.S.'s office for services. (Tr. Vol. 3, p. 700, line 9 - p.701, line 18). The Undersigned further finds that this type of communication from *Parent* to *Student* and her sibling helped poison their attitude toward learning at ABC Charter School and made implementing an IEP very difficult for teachers and administrators at ABC Charter School.

37. *Parent* demanded ABC Charter School hold another IEP Team meeting which ABC Charter School did in October of 2007. *Parent* was aggressive, combative and demeaning towards ABC Charter School's staff. (Tr. P. 698, line 12, p. 700, line 3)

38. *Parent* had other encounters with teachers and administrators at ABC Charter School's school in the second quarter of 2007 which led her to send an e-mail to Mr. Phil Adkins, the Chairman of ABC Charter School's Board of Directors as well as the attorney for the school. (Pet. Ex.5, e-mail dated 12/12/07).

39. On or about December 12, 2007, Mr. T.D. directed *Student's* teachers that they did not have to respond to *Parent's* e-mails that were accusatory or demeaning, but to continue to provide information she requested. (Tr. Vol. 2, p. 331, line 24- p. 333, line 8).

40. In response to *Parent's* complaint, Mr. Adkins convened a meeting on 12/12/07 between himself, *Parent*, D.S., the ABC Charter School's Director of Special Education, and R.M., ABC Charter School's Assistant Principal. Mr. Adkins did not disclose that Mr. T.D. was his brother-in-law, but dealt with the problems *Parent* identified related to the provision of *Student's* special education services.

41. In the meeting, Mr. Adkins offered to have an objective outside neutral person evaluate her complaints, but *Parent* rejected that option. (Pet. Ex. 5, meeting minutes, p. 2). The parties discussed *Parent's* concerns that *Student* was not being taught the seventh grade math curriculum, that *Student* received two first quarter report cards, concerns about remediation in math, English and social studies, periodic progress reports, measurable goals, and the difference between *Parent's* and teacher's expectations.

42. Mr. Adkins directed the staff to provide *Parent* with a schedule of special education services, and an explanation (again) of the corrected first quarter report card. (Pet. Ex. 5, meeting minutes, p. 3). *Parent* seemed satisfied with the outcome of the meeting.

43. Following the Christmas break, R.M. provided the information Mr. Adkins directed to *Parent* by letter dated January 4, 2008. (Pet. Ex. 5).

44. *Parent* continued to e-mail ABC Charter School's teachers questioning schedule changes and grading.

45. On or about March 26, 2008, *Parent* filed a complaint with the North Carolina Department of Public Instruction, Exceptional Children Division ("DPI") against ABC Charter School. *Parent* alleged *Student* had not received a Free and Appropriate Public Education ("FAPE") because ABC Charter School had failed to provide:

- a. sufficient, appropriate education to make progress toward Annual Goals and short-term objectives,
- b. accommodations (specifically 'read aloud'),
- c. services as outlined in her IEP, and
- d. parental feedback regarding progress towards annual goals.

46. On March 28, 2008, *Parent* stopped by W.S.'s office unannounced and requested that *Student* be permitted to leave school at 12:30 p.m. beginning on April 8, 2008 so that *Student* could meet one-on-one with her private tutor. (Resp. Ex. 13).

47. On March 4, 2008, *Parent* sent an e-mail to W.S. "officially" requesting:

- a. Assistive Technology re-evaluation for *Student* and her brother;
- b. "Teacher notes" be added to the IEP for *Student* and her brother; and
- c. Each of *Student's* teachers provides *Parent* every week with a list of daily assignments, homework projects and scheduled tests and quizzes. (Pet. Ex. 12, e-mail from *Parent* dated March 4, 2008).

48. That same day, W.S. responded, offering to conduct the Assistive Technology Testing through the school's psychologist or occupational therapist and to hold an IEP meeting earlier than the annual review scheduled for mid-April, 2008. (*Id.*, e-mail from W.S. dated March 4, 2008). *Parent* responded with possible dates and a query about having her private psychologist

perform the testing. (*Id.*, e-mail from *Parent* dated March 10, 2008). Neither party followed up on the Assistive Technology Testing for STUDENT.

49. W.S. consulted with Mr. T.D. who, in turn, consulted special education experts at DPI and the members of *Student's* IEP Team. The ABC Charter School modified *Student's* school day as *Parent* had requested. (Res. Ex. 13) (Tr. Vol. 3, p. 584, line 10 - p. 586, line 6).

50. *Parent* did not request ABC Charter School pay for the tutor, nor did ABC Charter School offer to pay for the tutor. (Tr. Vol. 3, p. 586, line 10 - p. 587, line 60).

51. On April 14, 2008, the IEP. Team met, pursuant to written prior notice, to review and, if necessary, revise *Student's* IEP. (Resp. Ex. 14). *Parent* presented a draft IEP. (Resp. Ex. 17) for the team to consider. *Parent* aggressively pushed the nine short term goals included in her draft IEP despite the team's concerns that they were unrealistic. The team discussed classroom and test modifications and accommodations including use of a calculator, lap top computer and taking the Extends II EOC Test. W.S. informed *Parent* that STUDENT was due a three year re-evaluation on September 5, 2008. *Parent* inquired about Assistive Technology Testing and mentioned DPS might be a resource, though that was not a possibility as DPS does not cooperate with charter schools for testing. The Team included providing teachers' notes as an accommodation.

52. The IEP meeting was "paused" so that Mr. M. could make corrections to *Parent's* draft IEP to reconvene after the changes were made. (Resp. Ex. 14, IEP. meeting minutes, p. 3).

53. The draft IEP prepared by *Parent* did not provide for any speech/language services. *Parent* had a special education advocate, Ms. D., review the draft IEP before *Parent* presented it to the ABC Charter School's IEP team. (Resp. Ex. 23, e-mail from Ms. D. dated 4/2/08). (Tr. Vol. 1, p. 230, line 21 - p. 233, line 1).

54. On April 21, 2008, *Parent.*, *Student*, Ms. C.S. and Ms. R. met to review *Student's* IEP with her and her special education schedule. *Student* stated she did not want to attend ABC Charter School's school the next year.

55. On April 21, 2008, ABC Charter School sent its reply to *Parent's* complaint to DPI. (Pet. Ex 14).

56. Sometime later the draft IEP was corrected and the team, including *Parent.*, signed the IEP, though it was dated April 14, 2008. *Parent* did not object to anything nor request any additional services in the IEP meeting.

57. On May 27, 2008, DPI issued a report of its investigation of *Parent's* complaints against the ABC Charter School. (Resp. Ex. 2).

58. DPI found that ABC Charter School was non-compliant in that it:

- a. had failed to document that it had provided special education services outlined in *Student's* IEP for the first five week of the 2007-2008 school year or provide evidence that the social studies and language arts teachers had provided *Student* any modification or accommodations outlined in *Student's* IEP;
 - b. had failed to provide progress reports to *Parent* for the 2006-2007 school year, but had provided progress reports for the 2007-2008 school year;
 - c. failed to develop on IEP with all the required components, specifically the IEP team did not develop a transition component at the meetings on 4/19/07 and 4/14/08 because *Student* was 14 years of age. The statements about current levels of academic achievement and functional performance failed to provide details needed to develop measurable annual goals. The annual goals were not measurable because they did contain a level of attainment. The IEP failed to indicate *Student's* participation in extra-curricular and other non-academic activities or an explanation of why *Student* would not participate in said activities. (Resp. Ex. 2, p. 7).
 - d. failed to issue prior written notices with all the required components. (Resp. Ex. 2, p. 8).
59. DPI ordered ABC Charter School to comply with a corrective action plan that included:
- a. a targeted monitoring visit by DPI;
 - b. meet with *Parent* to develop a schedule to provide 41 hours of compensatory special education services;
 - c. schedule a facilitated IEP team meeting to correct the deficiencies in *Student's* IEP; and
 - d. provide staff development to ABC Charter School's staff regarding proper development of an IEP. (Resp. Ex. 2)
60. *Student* had previously been tested by the DPS School psychologist, W. J., in 2003 which was the information the IEP team utilized to develop *Student's* IEP's at ABC Charter School school. (Resp. Ex. 9).
61. On May 6, 2008, *Parent* retained Dr. Ken Benedict, licensed clinical psychologist from the Center for Psychology and Education in Chapel Hill, NC, conduct a comprehensive psycho-educational on her daughter due to concerns about the delivery of EC Services at ABC Charter School and to obtain updated information pertaining to (*Student's*) psycho-educational and psychological status. (Tr. Vol. 1, p. 20 and Resp. Ex. 7). Though Dr. Benedict had preliminarily discussed the testing results, the report of the testing was not available until mid-August, 2008. *Parent* never shared the report with ABC Charter School prior to filing the instant case.

62. During this evaluation, Dr. Benedict also conducted a Speech-Language Screening, in accordance with the NC Policies Governing Services for Children with Learning Disabilities (**NC Policy 1500-2.11(b)(15)**), and recommended that an “updated speech/language evaluation be conducted” and “that it appeared likely that there would be the need for intervention in the areas receptive and expressive language.” (T. Vol. 1, p.32) Dr. Benedict recommended *Student* undergo speech/pathology testing, that the IEP team develop concrete sub-goals and means of measurement, the addition of specific goals related to oral language, introducing age-appropriate material that will not overwhelm her, and experimental, hands-on visual-based learning. He also recommended a tutor during the summer because *Student* may lose skills if “left unpracticed” over longer periods of time, continued participation in extra-curricular pursuits and referral to a mental health professional for treatment of emotional and behavioral problems. (Resp. Ex. 7, pp. 12-14).

63. Dr. Ken Benedict testified as an expert in psycho educational testing. His testimony and the Report of Psycho-educational Evaluation (Resp. Exh. 8) showed, the *Student* was of “low-average to average ability but with severe learning disabilities” and “that it is difficult to get an overall measure of IQ because the IQ tests starts to break down as a measure of what it is supposed to measure and becomes more of an indicator of the language learning disabilities.” In fact on Matrix Reasoning, one visually-based subtest that relies on analytic or deductive reasoning rather than verbal-based abilities, *Student* scored in the 50th percentile. Dr. Benedict further testified that he “would have expected that the professionals interacting with her at the school would (have been) aware that there was something different about her listening and speaking skills as well as her articulation skills. (T. Vol. 1, pp. 27-30 and Resp. Exh. 8)

64. Dr. Benedict also testified that he found *Student's* IEP addressed the main areas of academic underachievement.

65. Normally, Dr. Benedict, in performing a psycho educational assessment, would obtain information from the student's classroom teachers. He did not when performing the assessment on *Student* (Tr. Vol. 1, p. 58, lines 15-24). He got information from *Parent* about problems at ABC Charter School, *Student's* tutor (Tr. Vol. 1, p. 58, lines 18-21) and read the DPI report of its investigation of *Parent's* complaint about ABC Charter School. (Tr. Vol. 1, p. 37, lines 18-25).

66. Dr. Benedict further testified that the previous psychological evaluation performed by W.J. in 2003 did not recommend a speech/language assessment be performed or speech/language services be provided. (Tr. Vol. 1, p. 54, lines 12-25). He also testified that the school staff would not normally have requested speech/language testing unless they recognized a problem. (Tr. Vol. 1, p. 55, lines 12-18). Dr. Benedict testified that he was not surprised that there were no speech language goals in *Student's* IEP because speech and language evaluations had not been performed for many years in the traditional public schools and that without that kind of testing, the IEP team would not have developed those goals. (Tr. Vol. 1, p. 31, lines 4-12)

67. Prior to reading the DPI report and hearing *Parent's* complaints, Dr. Benedict had a good impression of ABC Charter School's Special Education Department and had actually referred students to ABC Charter School. (Tr. Vol. 1, p. 50, lines 1-18).

68. Dr. Connie McDonald-Bell, PhD performed a speech/language evaluation on August 8 and 15, 2008. Dr. McDonald-Bell found *Student* had significant deficits in receptive and expressive language skills, higher order language processing deficits, working (short term) memory deficits, difficulties with word retrieval and auditory discrimination. Dr. McDonald-Bell made a number of recommendations to address *Student's* speech/language problems including language intervention 45 minutes a week and direct intervention by a speech language pathologist for auditory training and basic language acquisition skills. (Resp. Ex. 8). *Parent* did not provide ABC Charter School with Dr. McDonald-Bell's report.

69. At no time prior to hiring Drs. Benedict and McDonald-Bell, did *Parent* request the school perform new psycho-educational or speech/language diagnostic testing. (Tr. Vol. 2, p. 310, lines 11-23; p. 312, lines 21-23). W.S., ABC Charter School's Exceptional Children's Supervisor of Special Programs, testified that in the spring of 2008, *Parent* indicated she was opposed a retesting her daughter. W.S. testified that he had one or two conversations with *Parent* about retesting *Student*. W.S. informed *Parent* that ABC Charter School had a new psychologist on board and that he would like or the team would like to pursue some testing on *Student*. In response, *Parent* stated, "Oh, no, we're not going to play that game. She may in fact test out and you wouldn't be providing her any services." (Tr. Vol. 3, p. 566) W.S. also testified that at the April 14, 2008 IEP meeting, the notes indicate that "W.S. discussed and made note to parent that *Student* would be looking at a three year reevaluation upon return meeting on 09//05/08." (Tr. Vol. 3, p. 567.) W.S. testified that he did not believe *Parent* was officially requesting a speech evaluation of her daughter and that ABC Charter School was relying upon the 2003 IEP. W.S. testified further that at no time during the 2007-2008 school year did C.R. ask for a psychological educational evaluation of her daughter, and that would have required the signing of a DEC 2. (Tr. Vol. 3, p. 567-568)

70. On June 9, 2008, ABC Charter School held a IEP team meeting, facilitated by *** from DPI to correct the deficiencies required by DPI. (Resp. Ex. 6).

71. At that IEP meeting, *Parent* indicated she had the results of Dr. Benedict's testing, but she indicated the results were lower than *Student* really was. The staff described *Student's* significant difficulty in math skills as well as language arts. *Parent* disagreed with some of the staff's assessments of *Student's* level of proficiency (Resp. Ex. 16, IEP meeting minutes).

72. During the IEP meeting, the team discovered that *Student's* EOG had been improperly administered. She was given the accommodation of "read aloud" rather than "read everything", which was a violation of the IEP test accommodations. ABC Charter School agreed to have *Student* re-tested. (Resp. Ex. 16, IEP meeting minutes).

73. On June 10, 2008, ABC Charter School re-tested *Student* and sent the re-test to the Regional Test Coordinator, Barbara Collins, for grading. The ABC Charter School's testing coordinator, L.A., testified that she placed *Student's* re-test in an envelope with other student's tests, sealed the envelope and personally mailed the envelope to Ms. Collins. (Tr. Vol 1, p. 123, line 11-p. 124, line 23).

74. The evidence shows that ABC Charter School contacted Ms. Collins only to learn that the re-tests had apparently been lost. ABC Charter School offered to re-test *Student* which offer was refused. (Resp. Ex. 4). *Student* presented no evidence that anyone at ABC Charter School's school intentionally misplaced or lost the re-test.

75. Pursuant to discussion with D.S., *Parent* created and provided a schedule for ABC Charter School to provide the 41 hours of compensatory special education services over the summer of 2008. (Resp. Ex. 2, e-mail dated June 8, 2008 and "Enclosure 1"). The schedule *Parent* proposed provided for only 28 hours of compensatory services before school started in August.

76. ABC Charter School provided transportation one-way to *Student's* home for the tutoring sessions and would have provided transportation home had that been requested.

77. On July 28, 2008, *Parent* telephoned W.S. indicating she was discontinuing the compensatory services because she was moving to Orange County and *Student* would not be attending ABC Charter School. (Resp. Ex. 2, Enclosure 3, e-mail dated August 1, 2008). *Parent* cancelled the last three weeks of compensatory services.

78. Neither *Parent* nor ABC Charter School attempted to reschedule the remaining 27 hours of compensatory services until ABC Charter School, pursuant to directions from DPI, contacted *Parent* on January 12, 2009 offering to provide services to *Student* (Resp. Ex. 5, e-mail from Jessica Reiniger dated January 12, 2009).

79. *Parent* declined the offer because *Student* was doing fine at ABC Middle School in Hillsborough, North Carolina. *Parent* advised ABC Charter School officials that *Student* was receiving tutoring and working on grade with appropriate support and modifications. (Resp. Ex. 6, *Parent* e-mail dated January 20, 2009).

80. Though *Parent* had the benefit of the reports of Drs. Benedict and McDonald-Bell, she did not request that ABC Middle School modify *Student's* IEP or provide a speech/language specialist as was recommended.

81. On April 17, 2009, DPI wrote ABC Charter School indicating it had complied with the corrective actions outlined in the May 27, 2008 letter and except for providing the compensatory special education services, but that ABC Charter School was no longer obligated to provide those services because *Parent* had declined them. (Resp. Ex. 6).

82. *Parent* complained that ABC Charter School's admissions policy violated the Charter School Act.

83. ABC Charter School admitted *Student* without any problem or conditions. (Tr. Vol. 1, p. 187, lines 19-21), and promoted her to the seventh and eighth grades without any problem or conditions. (Tr. Vol. 1, p. 188, lines 6-8).

84. On May 28, 2008, *Parent* e-mailed W.S. with a copy to T.D., R.M., C.S., and Paul Adkins. *Parent*, referencing Page 20 of the Handbook on Parent's Rights, asked ABC Charter School for disciplinary files for *Student* and her sibling and requested the "types and location of records maintained" by ABC Charter School. (Pet. Ex. 19, e-mail from *Parent* dated May 28, 2008).
85. On May 29, 2008, *Parent* e-mailed Mr. T.D. renewing her request to review *Student* and *Student's* records. (Pet. Ex. 19, e-mail from *Parent* dated May 29, 2008).
86. W.S. replied on June 2, 2009 asking *Parent* to call him to discuss options to fulfill ABC Charter School's obligations to *Student* (Pet. Ex. 19, e-mail from W.S. dated June 2, 2008).
87. Prior to *Parent's* request of May 28 or 29, 2008, W.S. had copied *Student's* Special Education file and provided it to *Parent*. (Tr. Vol. 1, p. 242, lines 3-13) and the school secretary, MRS.V. had provided copies of *Student's* cumulative file to *Parent*. (Tr. Vol. 1, p. 242, lines 14-21).
88. The only records regarding *Student* ABC Charter School did not provide *Parent* were the grade books which ABC Charter School's counsel had advised ABC Charter School it did not have to provide. (Tr. Vol. 1, p. 242, line 22 - p. 248, line 12 and p. 244, lines 11-17).
89. *Parent* complained that at the end of *Student's* sixth grade year, one of ABC Charter School's teachers advised *Parent* that *Student* had completed her EOG tests and could stay home for three days. (Tr. Vol. 1, p. 168, lines 11-20). *Student* did not stay home, but attended school for those three days. (Tr. Vol. 1, p. 169, lines 23-25; p. 195, lines 13-20).
90. *Parent* admitted that she did not like *Student's* special education teacher, and alleged that she had intentionally tried not to provide special education services to *Student* (Tran. Vol. 1, p. 255, lines 7-12). *Parent* complained to DPI that after she filed her complaint, Ms. C.S. continued her intentional and negligent disregard of the IDEA, NCLB Act, and North Carolina DPI statutes, policy and procedure through failure to provide accommodations for both *Student* and DR in administering 2008 state mandated end of grade examinations. (Resp. Ex. 22, e-mail to Mr. H. dated 9/29/2008). She also demanded ABC Charter School's staff "be found guilty" of intentional destruction of or in the alternative gross misconduct and negligence in handling of official student records. (Resp. Ex. 22, p 2 of e-mail to Mr. H. dated 9/29/2008.)
91. Mr. T.D. the Director of ABC Charter School, testified that the lack of a 7th grade EOG test result would not adversely affect *Student's* education or to graduate from high school. (Tran. Vol. 2, p. 353, line 24 - p. 354, line 12).
92. Mr. T.D. testified that he believed *Student* had received a Free and Appropriate Education at ABC Charter School during her seventh grade year. (Tr. Vol. 2, p. 355, line 7 - p. 356, line 7). Mr. B.A., *Student's* seventh grade English teacher testified he believed *STUDENT* had received a FAPE during her seventh grade year. (Tr. Vol. 2, p. 485, line 12 - p. 486, line 3). Ms. D. G., *Student's* seventh grade math teacher also felt *Student* got a FAPE (Tr. Vol. 2, p. 508, line 25 - p.

509, line 22). W.S. also testified that he believed *Student* had received a FAPE. (Tr. Vol. 3, p. 622, lines 5-8).

93. *Student* had a private tutor during the summer of 2007, the 2007-2008 and 2008-2009 school years. *Parent* spent and is claiming ABC Charter School should reimburse her \$3,099.50 for private tutoring for the 2007-2008 school year. She has also requested an additional \$5,040.00 for the 2008-2009 and 2009-2010 school years.

94. ABC Charter School was unable to provide 28 hours of compensatory special education services ordered by DPI and *Parent* is claiming reimbursement for 35 hours at \$35.00 an hour; a total of \$1,225.00 without presenting any evidence of the prevailing value of compensatory services.

95. *Parent* paid and requests reimbursement for *Student*'s educational testing of \$3,105.00.

96. *Student* has not received any speech language services, but *Parent* has requested that ABC Charter School pay \$2,995.00 to *Student* for anticipated therapy.

97. *Parent* moved from Durham County to Orange County at a cost of \$1,831.00, half of which *Parent* has requested that ABC Charter School reimburse.

98. *Parent* has requested reimbursement of legal fees of \$500.00, but *Parent* represented herself.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (1993).

3. *Students* have the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The *Students* have the burden of proof by preponderance or a greater weight of the evidence regarding the issues enumerated above. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side.

4. *Student* is a child with a disability pursuant to N.C. Gen. Stat. § 115C-106.3 and is entitled to receive a free appropriate public education (FAPE) pursuant to the IDEA, 20 U.S.C. § 1412, 34 C.F.R. 300.121, and the North Carolina General Statutes and the North Carolina Procedures Governing Programs and Services for Children with Disabilities.

5. *Student* is entitled to the preparation and implementation of an Individualized Education Program (IEP) as a consequence of being identified as a child with special needs. The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985). The floor of educational benefit cannot be so low as to allow the child to squander his untapped potential for learning. “Trivial education advancement” is insufficient to satisfy the requirement for a FAPE. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1998), *cert denied*, 488 U.S. 1030 (1989).

6. In *Board of Education v. Rowley*, 458 US 176 (1982) the Supreme Court established both a procedural and a substantive test to evaluate a state’s compliance with the IDEA. Quoting from the Court, “First has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts’ procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” A determination that the District has failed either test is sufficient to support a determination that it did not provide an appropriate program. *Hacienda La Puente Sch. Dist. Of L.A. v. Honig*, 976 F.2d 487 (9th Cir. 1992).

7. Several factors are examined to determine whether an IEP provides FAPE. Consideration must be given to whether the program is individualized on the basis of the student’s assessment and performance; whether the services are provided in a coordinated and collaborative manner; whether positive academic and non-academic benefits are demonstrated; and, whether the program is administered in the least restrictive environment.

8. *Student* must demonstrate that a procedural violation of the IDEA must interfere with ABC Charter School's provision of a FAPE to *Student* in order to prevail. (*Gadsby v. Grosmick*, 109 F.3d 940 (4th Cir. 1997).

9. ABC Charter School satisfies the requirement to provide *Student* a FAPE when it provides personalized instruction with sufficient support services to permit *Student* to benefit educationally from that instruction. The "instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act, and if the child s being educated in the regular classrooms of the public education system should be reasonable calculated to enable the child to achieve passing marks and advance from grade to grade. (*Board of Education v. Rowley*, 458 US 176 (1982). Since Rowley courts have ruled consistently that the IDEA guarantees a basic floor of opportunity for an education and that to provide FAPE an IEP must be reasonably calculated to provide meaningful educational benefit but necessarily the best educational possible.

10. The undersigned finds as a matter of law that ABC Charter School did not provide a FAPE during the first five (5) weeks of the 2007-2007 school year. There was not documented evidence that the social studies and language arts teachers provided *Student* any modification or accommodations outlined in *Student*’s IEP during the five week period. As to the remainder of

the School year the undersigned finds as a matter of law, that while ABC Charter School's provision of educational services to *Student* may not have been what *Parent* thought it should have been, it met the standard of *Rowley* and did not deny *Student* a FAPE. Although, the IDEA requires that "states must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child," it does not require the furnishing of every special service necessary to maximize each handicapped child's potential." *Hartmann v. Loudoun County Bd. Of Educ.*, 118 F.3d 996 (4th Cir 1997). Moreover, there is no requirement that ABC Charter School offer special education in the exact manner or scope as requested by the parent.

11. While ABC Charter School admits that it had numerous other procedural violations other than those occurring during the first five weeks of the 2007-2008 school year with respect to implementing *Student's* IEP, those violations, the undersigned finds as a matter of law that these violations viewed individually and collectively do not amount to a deprivation of FAPE for *Student*. I find as a matter of law that both ABC Charter Schools and *Parent* bare some responsibility for many of the deficiencies in *Student's* educational benefits received while at ABC Charter School. The record is replete with communications between the parties, including numerous emails which mostly serve to deepen the hostility between *Parent* and those charged with implementing *Student's* IEP. *Parent* expressed to *Student* her dislike for *Student's* special education teacher in particular and others at ABC Charter School in general, and this contributed to an impossible teaching atmosphere for *Student* at ABC Charter School. *Student* could not reach her full potential if she received confirmation from her mother that she did not have to attend class and do her best. Moreover, *Parent* chose to abandon 28 of the 41 hours of compensatory special education services tutoring which was a part of DPI's corrective action plan. The record is not clear why ABC Charter School waited until January 12, 2009 to attempt to reschedule the remaining 27 hours of tutoring or why *Parent* chose to abandon the last three weeks of tutoring since she believes *Student* was denied a FAPE. Nevertheless, the undersigned finds that it is *Student* whose interest in receiving a FAPE is paramount, and is entitled to receive 28 hours of tutorial services. Therefore, monetary compensation in the amount of \$980.00 for 28 hours of compensatory services at the rate \$35.00 per hour shall be awarded to *Student*. The IDEA permits a Court to "grant such relief as the court determines is appropriate." 20 U.S.C. §1415(i)(2)(e)(iii). The undersigned makes this finding in spite of the fact that *Parent's* own evidence shows she was generally satisfied with *Student's* 6th grade year at ABC Charter School, but hired a tutor for *Student* prior to the start of *Student's* 7th grade year and even after leaving ABC Charter School continues to employ a tutor. The undersigned finds this amount to be reasonable and appropriate to remedy any educational deficits brought about ABC Charter School's failure to provide a FAPE to *Student* for the five week period in the 2007-2008 school year. Other than this five week period, the undersigned finds as a matter of law that *Student* did not satisfy her burden of proving by a preponderance of the evidence that *Student* was denied a FAPE at ABC Charter School during the 2007-2008 school year.

12. The IDEA does not permit parents to recover compensatory or punitive damages *Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629 (4th Cir. 1985); *Sellers v. School Board* F3d (4th Cir. 1998)

13. *Student* is not entitled to attorney fees pursuant to 20 U.S.C. §1415 (2000) as she represented herself and is not an attorney.

14. *Student* is not entitled to reimbursement for expert witness fees for Drs. Benedict and Dr. Connie McDonald-Bell. Dr. Benedict testified that he would have expected the professionals interacting with *Student* at ABC Charter School to have been aware there was something different about *Student's* listening skills as well as her articulation skills. However, Dr. Benedict's testimony was that school staff would not normally have requested speech/language testing unless they recognized a problem and that he was not surprised there were no speech language goals in *Student's* IEP because speech language evaluations had not been performed for many years in the traditional public schools and that without that kind of testing, the IEP team would not have developed those goals. In addition, the undersigned finds that under the specific facts of this case, *Parent's* failed to notify ABC Charter School that she planned to retain Dr. Benedict and McDonald if they did not provide such testing. Moreover, the draft IEP prepared by *Parent*, herself, did not contain any speech/language services and had been reviewed by Ms. D., *Parent's* special education advocate, before being presented to the IEP Team. *Parent* was present at *Student's* IEP meeting on April 14, 2008 when ABC Charter School indicated that *Student* would have her three year re-evaluation, which would include psycho-educational testing. *Parent* did not object to waiting until the fall of 2008. Nor did she request that ABC Charter School perform psycho-educational testing or that ABC Charter School pay for independent testing by Dr. Benedict until *Parent* filed the current petition. Absent, a finding that ABC Charter School neglected to timely perform such evaluations after a proper request and was given an opportunity to choose the evaluators, the undersigned cannot find as a matter of law that *Student* is entitled to reimbursement for the costs of the evaluations or for expert witness fees.

15. Moreover, Dr. McDonald-Bell's evaluation was not conducted until August 8, 2008, after *Student* had left ABC Charter School. *Student* is not entitled to recover for the Oral language evaluation performed by her. Though *Parent* mentioned that speech language might be a problem in the August 21, 2007 IEP team meeting, she did not request a speech language evaluation at that time. Notably, *Parent* made an "official request" for an assistive technology evaluation, among other things, in an email to W.S. on March 4, 2008, but failed to request a speech language evaluation. Furthermore, she did not ask ABC Charter School to perform or pay for a private speech language evaluation before she engaged Dr. McDonald-Bell without ABC Charter School's knowledge and failed to share the report with ABC Charter School.

16. DPI addressed each allegation contained within *Parent's* complaint and made a determination of what remedy should be enforced against ABC Charter School for the procedural violations. DPI made no findings and cited no deficiencies on ABC Charter School's part relating to ABC Charter School's failure to conduct additional psychological evaluations of *Student* or whether ABC Charter School must provide these evaluations as a part of the corrective action plan DPI imposed upon ABC Charter School. While not bound by DPI's decision, an agency's decision is to be given appropriate weight as North Carolina law gives great deference to an agency's interpretation of a law it administers. *Dept. Of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E. 2d 177, 181 (2000)

17. *Student* is not allowed to recover for moving expenses because they are compensatory not related education expenses.

18. *Student* cannot recover for *Parent's* lost time at work while she represented *Student*. Lost time at work has long been considered an inconvenience associated with litigation, but not compensable as damages. Furthermore, lost time would be compensatory, not traditional educational expenses that this court could award if it found ABC Charter School had failed to deliver a FAPE.

19. *Student* cannot recover office supplies, photocopying charges, postage or parking as they are not included as costs of court in NCGS§7A-305.

20. With the exception of proving that ABC Charter School failed to provide a FAPE for a five week period in the 2007-2008 school year, *Student* failed to carry her burden to show the court that the procedural errors of which she complains interfered with ABC Charter School's provision of a FAPE to *Student* (*Gadsby v. Grosmick*, 109 F3d 940 (4th Cir. 1997). The undersigned finds that all other procedural violations alleged by *Student*, including the procedural violations set forth below (a-e) to be either without merit or de minimis as a matter of law.

- a. For example, *Student* alleged that ABC Charter School's admissions policy violated North Carolina State law, but ABC Charter School admitted and promoted *Student* without any problems or conditions;
- b. In March, ABC Charter School provided *Student* a second grade workbook and had her work at the second, fourth and fifth grade levels in Study Island, ABC Charter School's computerized educational program, yet ABC Charter School taught *Student* the seventh grade math curriculum, using those resources to supplement her deficiencies in math skills. In addition, contrary to *Parent's* allegations, *D.G.* testified that *Student* had use of a calculator in her math class and that she provided one to *Student* on the days she forgot to bring hers.;
- c. ABC Charter School's failure to provide the "read everything" accommodation on *Student's* end of grade test and the subsequent loss of the retest over the summer of 2008, did not affect *Student's* education given the body of work she had performed at ABC Charter School in the seventh grade, her promotion to the eighth grade and her success at ABC Middle School during her eight grade year;
- d. ABC Charter School's failure to provide *Student* the actual grade books where *Parent* had an opportunity and did discuss *Student's* grades with teachers at ABC Charter School and ABC Charter School provided *Parent* all *Student's* special education and cumulative files. *Parent* objected in one instance to the special education teacher modifying *Student's* grades to better reflect her knowledge of the subjects which is clearly appropriate given *Student's* learning disabilities. On another occasion, *Student* complained of a fluctuation of *Student's* grades in math, which ABC Charter School explained reflected ABC Charter School's attempt to modify *Student's* math curriculum at first making it too easy, then too hard and finally making appropriate modifications to challenge *Student* ABC Charter School

took great pains to try to accommodate *Student's* learning disabilities and *Parent's* numerous requests for accommodations, or

- e. Failure to timely provide *Student's* EC schedule to *Parent* did not affect the ABC Charter School's delivery of services, only frustrated *Parent* in her attempt to monitor ABC Charter School's provision of services to *Student*.

21. The testimony of *Student's* classroom teachers, J. A., B.A., W. F., D. G. and her special education teacher, Ms. C.S. demonstrated that ABC Charter School modified the seventh grade curriculum and provided accommodations in accordance with *Student's* IEP. Indeed Ms. C.S. may have failed to provide all of the hours of special education services, but ABC Charter School, pursuant to directions from Department of Public Instruction, provided some compensatory services to *Student* and offered to complete the services specified by Department of Public Instruction, which *Parent* cancelled. A parent may naturally not use the fact that the District complied with their wishes as a sword in their IDEA action. (MM ex rel. DM v. School Dist. Of Greenville County, 303 F3d 523)(4th Cir. 2002).

22. Finally, it is imperative that educators and parents work together for the benefit of students who have disabilities. Unfortunately, *Parent's* own actions destroyed the trust that had existed between her and ABC Charter School's staff. The ABC Charter School's testimony demonstrated that *Parent* was domineering and intimidating during IEP team meetings and in conversations with teachers. *Parent's* e-mails to ABC Charter School's staff were often accusatory and demeaning and when the staff responded to *Parent*., she was often not satisfied or disagreed with the answer or explanation. For example, she repeatedly questioned Ms. C.S. concerning *Student's* first quarter report card which was mistakenly sent out without Ms. C.S.'s modifications due to *Student's* learning disabilities which undermined ABC Charter School's ability to motivate and teach *Student* *Parent* told *Student* that ABC Charter School's staff and, particularly Ms. C.S., were incompetent. *Student's* attitude prompted Mr. T.D. to advise his staff in the late second quarter that they did not have to respond to demeaning e-mails from *Parent*, but to act professionally and respond to requests for information *Parent* needed. Indeed, ABC Charter School's staff acted professionally despite *Parent's* repeated accusations and overt suspiciousness.

23. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq.* There is also a Memorandum of Understanding between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings.

24. "The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required.

The former system is often referred to as a two-tiered system, while the latter is known as a one-tiered system.” *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

25. “North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State.” Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the official position of the state educational agency. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

26. A court must try to give meaning to all provisions of a statute and additionally to consider the intent of the legislature when creating the statute. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. *Id.* at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991).

27. In accord with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision. Harmonizing the provisions of § 150B with § 115C so as “not rendering any part of them meaningless,” and in light of the above cited case law, should a decision in special education matters be appealed to a state review officer (who renders the official position of the state education agency), then N.C.G.S. § 150B-36 shall apply. This is further consistent with Paragraph 8 of the Memorandum of Understanding which states: “The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. The review officer must also consider any further evidence presented to him or her in the review process.”

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that with the exception of failing to provide *Student* a FAPE for a five week period during the 2007-2008 school year, the ABC Charter School provided *Student* a FAPE in accordance with the IDEA. ABC Charter School is ordered to pay to *Student* \$980.00 for compensatory special education tutorial services.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with 20 U.S.C. § 1415(f) the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i).

In accordance with 20 U.S.C. § 1415(g) "if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency." The State educational agency shall conduct an impartial review of the findings and decision appealed. In accordance with 20 U.S.C. § 1415(h) "any party to a hearing conducted pursuant to subsection (f) . . . , or an appeal conducted pursuant to subsection (g) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children disabilities; (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and, (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions."

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

"North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. In accordance with N.C. Gen. Stat. § 150B-36 the decision of the Administrative Law Judge shall be adopted unless it is demonstrated that the decision of the

Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The review officer must also consider any further evidence presented in the appeal process.

In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines, should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This is the _____ day of December, 2009.

Joe L. Webster
Administrative Law Judge